(2)

No. 88-767

Supreme Court, U.S.
FILED
DEC 8 1988
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

ROCKY L. RELIFORD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

WENDELL A. KJOS
Capt., JAGC, USN

LAURA L. SCUDDER
Maj., USMC

SCOTT A. HAGEN
Lt., JAGC, USNR
Appellate Government Counsel
Appellate Government Division, NAMARA
Washington, D.C. 20374-1111

12 pp

QUESTION PRESENTED

Whether Article 52(a)(2) of the Uniform Code of Military Justice, 10 U.S.C. 852(a)(2), permits a defendant to be convicted by the concurrence of two-thirds of the members of a court-martial panel for an offense with a mandatory minimum sentence of life imprisonment.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	4
Conclusion	8

TABLE OF AUTHORITIES

Cases:

Anderson v. *Hunter*, 177 F.2d 770 (10th Cir. 1949)	7
Brown v. *Hiatt*, 81 F. Supp. 647 (N.D. Ga. 1948), aff'd, 175 F.2d 273 (5th Cir. 1949), rev'd, 339 U.S. 103 (1950)	6, 7
Campo, Ex parte, 71 F. Supp. 543 (S.D.N.Y.), aff'd *sub nom. United States ex rel. Campo* v. *Swenson*, 165 F.2d 213 (2d Cir. 1947)	7
Hurse v. *Caffey*, 59 F. Supp. 363 (N.D. Tex. 1945)	7
McKinney v. *Warden*, 273 F.2d 643 (10th Cir. 1959), cert. denied, 363 U.S. 816 (1960)	7
Middendorf v. *Henry*, 425 U.S. 25 (1976)	6
Stout v. *Hancock*, 146 F.2d 741 (4th Cir. 1944), cert. denied, 325 U.S. 850 (1945)	7
United States v. *Dodson*, 16 M.J. 921 (N.M.C.M.R. 1983), aff'd, 21 M.J. 237, denial of petition for reconsideration, 21 M.J. 276 (C.M.A.), cert. denied, 479 U.S. 1006 (1986)	6
United States v. *Morphis*, 7 C.M.A. 748, 23 C.M.R. 212 (1957)	6
United States v. *Shroeder*, 27 M.J. 87 (C.M.A. 1988), petition for cert. pending, No. 88-873	6, 7
United States v. *Walker*, 7 C.M.A. 669, 23 C.M.R. 133 (1957)	6

Statutes:

Uniform Code of Military Justice, 10 U.S.C. 801 *et seq.*:	
Art. 51(a), 10 U.S.C. 851(a)	5
Art. 52(a)(1), 10 U.S.C. 852(a)(1)	3, 8

Statutes—Continued: Page

Art. 52(a)(2), 10 U.S.C. 852(a)(2) 3, 4, 6, 7, 8
Art. 52(b)(1), 10 U.S.C. 852(b)(1) 3
Art. 52(b)(2), 10 U.S.C. 852(b)(2) 3, 4, 5, 7
Art. 52(b)(3), 10 U.S.C. 852(b)(3) 3
Art. 81, 10 U.S.C. 881 1-2
Art. 118, 10 U.S.C. 918 ..... 1-2, 7
Art. 121, 10 U.S.C. 921 1-2
Art. 123, 10 U.S.C. 923 1-2

Miscellaneous:

H.R. Rep. 491, 81st Cong., 1st Sess. (1949) 8
S. Rep. 486, 81st Cong., 1st Sess. (1949) 8
W. Winthrop, *Military Law and Precedents* (2d ed. 1920) 8

In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-767

ROCKY L. RELIFORD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Military Appeals (Pet. App. 1a-3a) is reported at 27 M.J. 176. The opinion of the Navy-Marine Corps Court of Military Review (Pet. App. 4a-9a) is unreported.

JURISDICTION

The judgment of the Court of Military Appeals was entered on August 12, 1988. The petition for a writ of certiorari was filed on November 8, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. (Supp. IV) 1259(3).

STATEMENT

Petitioner, a member of the United States Marine Corps, was convicted by a general court-martial of conspiracy to commit robbery, conspiracy to commit murder, two specifications of premeditated murder while perpetrating a robbery, and larceny, in violation of Articles 81, 118, 121, and 123 of the Uniform Code of Military

Justice (UCMJ), 10 U.S.C. 881, 918, 921, and 923. Petitioner was sentenced to confinement for life, forfeiture of all pay and allowances, reduction to pay grade E-1, and a dishonorable discharge. The convening authority approved the findings and sentence. The Navy-Marine Corps Court of Military Review affirmed the findings and sentence (Pet. App. 4a-9a). The Court of Military Appeals consolidated the two conspiracy charges but otherwise affirmed (*id.* at 1a-3a).

1. The charges against petitioner arose from the robbery and murder of Marine Lance Corporal Raymond Hiquiana and his wife Mabel in Kitanakagusuku, Okinawa. According to an accomplice, Corporal Michael Shroeder,[1] petitioner and another Marine, Corporal Alan Clark, decided to rob and murder the reputedly wealthy Hiquianas (Tr. 463-464). Shroeder asked to go along, and he served as the driver (Tr. 464-465). Petitioner and his confederates staked out the Hiquianas' apartment and followed Raymond Hiquiana as he drove to pick up his wife at work. The conspirators then quickly returned to the Hiquianas' apartment and waited outside the apartment for the Hiquianas to return (Tr. 464-473). Petitioner and Clark persuaded the Hiquianas to let them into the apartment while Shroeder stayed with the car (Tr. 473-475). Petitioner and Clark later returned to the car, covered with blood and carrying stolen stereo and video equipment (Tr. 475-477). As Shroeder drove the gang to petitioner's apartment, petitioner and Clark described how they had killed the Hiquianas by slitting their throats with utility knives (Tr. 478-479). Petitioner later used Raymond

---

[1] Shroeder confessed to his role in the murders and testified for the government at petitioner's trial after being convicted in a separate proceeding (Tr. 460-512).

Hiquiana's identification to withdraw the Hiquianas' savings from their local accounts.[2]

2. A court-martial is a bifurcated proceeding with separate guilt and sentencing stages, and the members of the court-martial panel must separately decide each question. When capital punishment is the mandatory penalty for a charged crime, the panel members must agree unanimously to convict a servicemember of that offense. Art. 52(a)(1), UCMJ, 10 U.S.C. 852(a)(1). For any other offense, a servicemember may be convicted by a two-thirds vote of the panel. Art. 52(a)(2), UCMJ, 10 U.S.C. 852(a)(2). The sentencing stage then commences. After hearing evidence in aggravation and mitigation, the panel votes on an appropriate sentence. In order to impose a capital sentence, the panel must be unanimous. Art. 52(b)(1), UCMJ, 10 U.S.C. 852(b)(1). To impose a sentence of life imprisonment or a term of confinement for more than ten years, three-fourths of the panel must agree. Art. 52(b)(2), UCMJ, 10 U.S.C. 852(b)(2). Any other sentence may be imposed by a two-thirds vote of the panel. Art. 52 (b)(3), UCMJ, 10 U.S.C. 852(b)(3).

---

[2] Shroeder's testimony was corroborated by several other items of evidence: For example, petitioner was identified by a bank teller as the person who withdrew the Hiquianas' savings, and petitioner's fingerprints were found on the bank documents (Tr. 557-558, 615-616). Petitioner gave his girlfriend a gold bracelet that had belonged to Mabel Hiquiana (Tr. 536). Petitioner's fingerprints were found on two videotapes stolen from the Hiquianas' apartment (Tr. 486, 571). The blood found in Shroeder's car was consistent with Shroeder's story (Tr. 445, 449-451, 574-575). An Okinawan mechanic testified that he had helped petitioner hide the stolen video equipment and that he later helped Shroeder dispose of it (Tr. 539-540). Shroeder also made admissions to a friend that were consistent with his confession. The friend watched Shroeder clean out his car and helped Shroeder dispose of the bloody videotapes (Tr. 715-721).

In this case, the court-martial members were instructed at the guilt stage of trial, without defense objection, that a two-thirds majority vote was required to convict petitioner of each of the charged offenses (Tr. 770). The panel found petitioner guilty of all charges and specifications (Tr. 784). During the sentencing phase of the trial, again without objection by the defense, the court members were instructed that life imprisonment was the mandatory penalty for premeditated murder, although all other aspects of the sentence (such as the appropriate amount of pay that petitioner should forfeit) were open for their consideration (Tr. 810). The panel members were also instructed to vote on each proposed sentence in its entirety until they reached the required three-quarters concurrence (Tr. 817). The members imposed a sentence that included confinement for life (Tr. 819).

ARGUMENT

Petitioner argues that his murder conviction is invalid because the court-martial panel was instructed that he could be convicted by a two-thirds vote of the panel members. Although Article 52(a)(2) of the UCMJ, 10 U.S.C. 852(a)(2), provides that a two-thirds majority of the court-martial panel is sufficient to convict a defendant for any offense except one in which the death penalty is mandatory, petitioner argues that a separate provision, Article 52(b)(2) of the UCMJ, 10 U.S.C. 852(b)(2), which requires a three-fourths majority vote to impose a sentence of ten or more years' confinement, should be interpreted to require the concurrence of three-fourths of the members of a court-martial panel to convict a defendant in any case in which he is charged with a crime for which there is a mandatory life sentence. Petitioner's contention does not warrant review by this Court, for several reasons.

1. Petitioner did not properly preserve his claim because he did not object at trial to the instruction that he could be found guilty of the charged offenses if two-thirds of the court-martial panel concurred in that finding. Petitioner did not raise that claim until after the court-martial panel had returned its findings, had sentenced him, and had been discharged (Tr. 821).[3] Accordingly, petitioner has waived his claim by failing to assert it in a timely fashion.

2. Petitioner's claim is also not properly raised by the record in this case. The gravamen of petitioner's claim is that a serviceman should not be sentenced to life imprisonment unless three-fourths of the court-martial panel have concurred in that sentence. The panel members in this case, however, were instructed in that manner at the sentencing phase. The trial judge instructed the panel members to "[v]ote on each sentence in its entirety, beginning with the lightest, until you reach the required concurrence, which is three-quarters" (Tr. 817). That instruction therefore fulfills the mandate of Article 52(b)(2) that the panel members should reach a three-fourths concurrence on every sentence imposing ten or more years of confinement.

3. Petitioner's contention involves a narrow question of the proper construction of the Uniform Code of Military Justice that has no application beyond the military

---

[3] Article 51(a) of the UCMJ, 10 U.S.C. 851(a), requires that the members vote by secret ballot. Even when more than two-thirds of the members vote to convict, that fact is not made public (see Tr. 770). The petition is therefore somewhat misleading when it states (Pet. 7-8) that petitioner was convicted by a two-thirds vote. The unopposed instruction to the court-martial panel ensured that there were at least eight (of eleven) votes for conviction. In fact, there may have been more. Petitioner also did not ask to have the panel members polled on their vote. Thus, only the required two-thirds vote for conviction was announced.

justice system and that presents no conflict among the circuits. The Court of Military Appeals rejected an identical claim in *United States* v. *Morphis,* 7 C.M.A. 748, 752-754, 23 C.M.R. 212, 216-218 (1957), and *United States* v. *Walker,* 7 C.M.A. 669, 673-675, 23 C.M.R. 133, 137-139 (1957), and it recently reaffirmed those decisions in the course of affirming the conviction of one of petitioner's accomplices, *United States* v. *Shroeder,* 27 M.J. 87, 88-91 (C.M.A. 1988), petition for cert. pending, No. 88-873.[4] The interpretation of the Uniform Code of Military Justice adopted by the military courts and the armed services is entitled to considerable deference. *Middendorf* v. *Henry,* 425 U.S. 25, 43 (1976); *Hiatt* v. *Brown,* 339 U.S. 103, 109 (1950). In *Walker, Morphis,* and *Shroeder,* the Court of Military Appeals reconciled Article 52(a)(2) and Article 52(b)(2) by noting that the first provision deals with the number of votes required for a conviction for particular offenses, while the second article deals with the number of votes required for a court-martial panel to impose particular sentences. The two votes occur at different points in the proceedings, the court pointed out, and they address different issues. The first vote concerns the question whether the government has proved that the accused committed the charged offenses, whereas the vote on sentencing requires the panel members to decide how severely the defendant should be punished. For these reasons, the Court of Military Appeals concluded that it was reasonable to treat the two votes separately in the statute. The court found nothing in the language of the UCMJ or its predecessors to justify applying the three-

---

[4] See also *United States* v. *Dodson,* 16 M.J. 921 (N.M.C.M.R. 1983) (rejecting an identical claim without discussion), aff'd on other grounds, 21 M.J. 237, supplemented on denial of petition for reconsideration, 21 M.J. 276 (C.M.A.), cert. denied, 479 U.S. 1006 (1986).

fourths concurrence rule of Article 52(b)(2) to the guilt stage in cases in which life imprisonment is mandatory. See, *e.g.*, *United States* v. *Shroeder*, 27 M.J. at 91.

The Court of Military Appeals' decisions in *Walker*, *Morphis*, and *Shroeder* are consistent with the decisions of the federal courts that have considered the relationship between Articles 52(a)(2) and (b)(2) of the UCMJ. See *McKinney* v. *Warden*, 273 F.2d 643, 644 (10th Cir. 1959), cert. denied, 363 U.S. 816 (1960); *Anderson* v. *Hunter*, 177 F.2d 770, 771 (10th Cir. 1949); *Stout* v. *Hancock*, 146 F.2d 741, 743-745 (4th Cir. 1944), cert. denied, 325 U.S. 850 (1945); *Brown* v. *Hiatt*, 81 F. Supp. 647, 650 (N.D. Ga. 1948), aff'd on other grounds, 175 F.2d 273 (5th Cir. 1949), rev'd on other grounds, 339 U.S. 103 (1950); *Hurse* v. *Caffey*, 59 F. Supp. 363, 364-365 (N.D. Tex. 1945); see also *Ex parte Campo*, 71 F. Supp. 543, 545 (S.D.N.Y.), aff'd *sub nom. United States ex rel. Campo* v. *Swenson*, 165 F.2d 213 (2d Cir. 1947). Like the Court of Military Appeals, those courts have concluded that Articles 52(a)(2) and (b)(2) establish separate and independent majority voting requirements for the guilt and sentencing stages of a court-martial.

Even apart from the deference due to the Court of Military Appeals' construction of the UCMJ, that court's analysis of the statutory scheme is correct. The plain language of Articles 52(a)(2) and 118 of the UCMJ, 10 U.S.C. 852(a)(2) and 918, supports the Court of Military Appeals' conclusion that a defendant may be found guilty of murder by a two-thirds vote of a court-martial panel. Article 52(a)(2) fixes a two-thirds majority vote requirement for conviction of any offense when capital punishment is not the mandatory penalty, and under Article 118, capital punishment is not the mandatory punishment for murder. If Congress had intended that murder would be exempt from the two-thirds majority vote requirement

established by Article 52(a)(2), Congress could easily have drafted the provision in that manner, as it did in the case of Article 52(a)(1) for crimes with a mandatory death penalty. Nothing in the text or legislative history of the statute, however, shows that Congress intended that result when it enacted the UCMJ. See H.R. Rep. 491, 81st Cong., 1st Sess. 26 (1949); S. Rep. 486, 81st Cong., 1st Sess. 23 (1949); see also W. Winthrop, *Military Law and Precedents* 377, 395 (2d ed. 1920). Furthermore, Congress has not amended the UCMJ to overrule the Court of Military Appeals' interpretation of these provisions in *Walker* and *Morphis* despite the fact that there have been three major revisions of the UCMJ since 1949. Accordingly, the court-martial panel members were properly instructed to reach their verdict at the guilt stage of petitioner's trial by a two-thirds vote.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

WENDELL A. KJOS
Capt., JAGC, USN

LAURA L. SCUDDER
Maj., USMC

SCOTT A. HAGEN
Lt., JAGC, USNR
Appellate Government Counsel
Appellate Government
Division, NAMARA

DECEMBER 1988

U.S. GOVERNMENT PRINTING OFFICE: 1988—241-699/00007